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Filing date: **09/25/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding | 92053501 |
| Party | Defendant Del Taco, LLC |
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| Submission | Reply in Support of Motion |
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| Signature | /april l besl/ |
| Date | 09/25/2012 |
| Attachments | Reply to Motion for Sanctions.pdf (5 pages)(65536 bytes) |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

CHRISTIAN M. ZIEBARTH,

Petitioner,

vs.

DEL TACO LLC

Respondent.

Reg. No. 1,043,729
Cancellation No. 92053501

RESPONDENT DEL TACO LLC'S REPLY BRIEF
IN SUPPORT OF ITS MOTION FOR SANCTIONS

Petitioner's Opposition to Respondent Del Taco's Motion for Sanctions fails to address why (1) Petitioner has plainly and willfully refused to comply with the Board Order of January 21, 2012 (hereinafter "Board Order") or (2) failed to supplement any of the deficient responses in the nearly seven months since that Order. Instead, Petitioner attempts to divert all focus and attention away from these undisputed facts in the alleged justifications and arguments in his Opposition that are nothing but red herrings and a blatant attempt to deflect the Board's attention away from Petitioner's blatant, consistent, and willful choice not to fully participate in the discovery process of this cancellation proceeding.

Simply put, Petitioner did not produce the substantive responses ordered by the Board on January 21, 2012. Instead, Petitioner willfully chose to withhold documents and information from the production and responses ordered by the Board, and Petitioner has willfully chosen not to supplement these deficient responses over the course of seven months. Instead, Petitioner allowed discovery in this proceeding to close without any action. In fact, it is only now, sixteen months after the original service of the requests and after the filing of a Motion for Sanctions that Petitioner asks this Board to grant him a fifth

bite at the discovery apple with Petitioner's sudden offer to supplement his deficient responses in his Opposition. See TTABVUE Filing #31. Petitioner has had numerous opportunities to supplement his responses and should not be rewarded for his ongoing failures to comply with his discovery obligations and the Board Order by again receiving more time.

Petitioner devotes the majority of his Opposition to arguing his alleged standing in this matter, rather than addressing the merits of his non-compliance with the Board Order. See TTABVUE Filing # 31, pgs. 1-6. This is again a red herring to detract from Petitioner's willful refusal to comply with the Board Order. The fact that Petitioner believes in the merits of his Petition is immaterial to his duty to comply with the Board Order and participate in discovery. The Board was clear in the Board Order that standing was a threshold issue that Petitioner himself must prove, and therefore discovery on this issue was proper. See TTABVUE Filing # 16. Petitioner's consistent refusal in this proceeding to provide substantive responses to Del Taco's discovery requests related to Petitioner's alleged standing on the ground that Petitioner's word is sufficient to establish standing is improper and constitutes a willful refusal to comply with the Board Order, thereby justifying dismissal of this proceeding.

The fact that Petitioner obtained new counsel in this proceeding *after* the Board Order was issued is immaterial and is another red herring argued in an attempt to distract the Board away from Petitioner's deliberate refusal to comply with the Board Order. Petitioner's conduct has remained consistent throughout this entire proceeding, regardless of counsel or representation. Not once did Petitioner request from the Board or Del Taco an extension of time to comply with the Board Order in light of the new counsel or alleged computer issues. Not once did Petitioner request an extension of the discovery period to allow for additional time to supplement his deficient responses. Not once did Petitioner

actually provide substantive responses as compelled by the Board Order. Instead, Petitioner itself willfully chose not to comply with the Board Order and to allow discovery to close in this proceeding without complying. There is no “harmless error” or “excusable neglect” by Petitioner under these undisputed facts. Rather, it is clear that Petitioner has flatly chosen to defy the Board Order and willfully refuse to participate in the discovery process from the beginning of this proceeding.

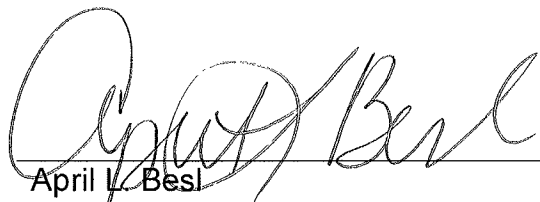
Even if “excusable neglect” or “harmless error” could somehow be found in Petitioner’s willful noncompliance with the Board Order after retaining new counsel, such “neglect” and “error” do not justify Petitioner’s complete failure and outright refusal to supplement the deficient discovery responses over the course of seven months through the close of discovery. This is particularly true given that during this seven month time period counsel for Del Taco verbally objected to the deficient production to counsel for Petitioner, who ultimately agreed that Petitioner would supplement the deficient production. Yet, to date, no supplemental responses or production were ever produced by Petitioner; nor did Petitioner request additional time in the discovery period to supplement the deficient production and responses. Instead, Petitioner again deliberately and willfully chose not to comply with the Board Order and purposefully allowed the discovery period to close without supplementing his responses as compelled by the Board Order.

Nothing in Petitioner’s Opposition or overall conduct throughout this proceeding demonstrates that giving Petitioner a fifth bite at the discovery apple will result in a substantive production or response in compliance with the Board Order, particularly after Petitioner allowed discovery to close in this proceeding without action. Petitioner has repeatedly demonstrated a complete disregard for the discovery process, the Trademark Rules, and the Board Order from the outset of this proceeding. Further, Petitioner’s Opposition makes it clear that Petitioner’s position is that his bare assertion of standing is

sufficient on its face to establish his standing, and as such, no other proof is necessary. See TTABVUE Filing # 31. Regardless of Petitioner's ill-founded belief, this belief does not establish Petitioner's compliance with the Board Order. In fact, the Opposition alone demonstrates that Petitioner's failure to comply with the Board Order is not due to "error" or "negligence," but rather, is due to Petitioner's deliberate choice and willful intention not to comply.

As such, Respondent Del Taco LLC respectfully requests that the Board grant its Motion for Sanctions against Petitioner and dismiss this cancellation proceeding outright with prejudice. In the alternative, Del Taco respectfully requests the Board issue an order precluding Petitioner from offering any evidence during the trial period of this proceeding which purports to establish or prove: (1) Petitioner's alleged *bona fide* intent to use the NAUGLES mark, and (2) Petitioner's alleged standing based on Petitioner's NAUGLES application, since Petitioner has completely failed to respond to Del Taco's discovery requests on these issues through the close of discovery and Petitioner has, therefore, completely denied Del Taco critical information relative to Petitioner's claims and Del Taco's defenses in this proceeding.

Dated: **September 25, 2012**



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by certified first-class mail, on this 25th of September, 2012, to Richard F. Christesen, 6905 S 1300, E #233, Midvale, Utah, 84047.


April L. Best